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consignor because of the recovery of the ostensible value of the package by the consignee. It is submitted that this view, although perhaps permitting unnecessary litigation in a few instances, is based on sounder principle, and is therefore preferable.

TAXATION OF A SPECIAL FRANCHISE.—Although corporate and so-called special franchises are alike in that both are privileges conferred by the government upon individuals, not belonging to them as of common right,¹ they are not identical. A special franchise is a grant from the public of some particular right wholly independent of the right to exist as a corporation and to exercise corporate privileges.² A corporate franchise, the right to exist as a corporation, belongs primarily to the corporators;³ a special franchise, to the corporation.⁴ The former may survive a surrender, or forfeiture, of the latter,⁵ and, conversely, a special franchise, as a vested right, may survive a revocation under a State's reserved right of amendment, of the corporate franchise.⁶ However, both are subject to the right of the State to tax privileges, which they undoubtedly are.⁷ Taxes on privileges, in the absence of express constitutional provision, need not proceed on a basis of valuation but may be of fixed amount or proportioned to the amount of business done.⁸

In view of the distinct character of corporate and special franchises it is obvious that a tax imposed upon the corporate franchise *eo nomine* would not include a special franchise owned by the corporation. In New York, the jurisdiction of the principal case,⁹ a tax is levied on the corporate franchise.¹⁰ Another distinct tax on the capital stock of a corporation has been construed to embrace only the tangible personalty.¹¹ Accordingly, prior to specific legislation, special franchises escaped taxation. In a few jurisdictions these franchises have been deemed taxable as realty on the ground that a franchise to occupy the soil of a street together with actual occupation constitutes an easement.¹² The consequent unavailability in New York of a valuable source of income led to legislation providing for an *ad valorem* tax on special franchises, as realty, this value together with that of the tangible property used in connection therewith, formally locally assessed, to be assessed by state officers.¹³ To the contended uncon-

¹ Kent, Comm. 458.

²9 COLUMBIA LAW REVIEW 160.

³Memphis R. R. Co. v. Com'rs. (1884) 112 U. S. 609.

⁴Memphis R. R. Co. v. Com'rs. *supra*.

⁵Grand Rapids Bridge Co. v. Prange (1877) 35 Mich. 400, 405.

⁶Pearsall v. Gt. Northern Ry. (1895) 161 U. S. 646.

⁷Horn Silver Mining Co. v. N. Y. (1891) 143 U. S. 305; Society for Savings v. Coite (1876) 6 Wall. 594.

⁸Delaware R. R. Tax Case (1873) 18 Wall. 205; State Tax on Railway Gross Receipts (1872) 15 Wall. 284.

⁹People *ex rel.* Jamaica Water Supply Co. v. State Board of Tax Com'rs. *infra*.

¹⁰People *ex rel.* v. Coleman (1891) 126 N. Y. 433; Laws of 1896 Ch. 908 § 182.

¹¹People *ex rel.* v. Barker (1895) 146 N. Y. 304.

¹²Consol. Gas Co. v. City of Baltimore (1905) 101 Md. 541; Citizens' St. Ry. Co. v. Common Council (1901) 125 Mich. 673.

¹³Tax Law § 2, subdivision 3; *id.* § 43; People v. Barker *supra*.

stitutionality of this mode of assessing the personalty in question it is answered that the State may provide the method for assessing a new species of property, created for the purpose of taxation.¹⁴ Nor are the provisions of the federal constitution violated since nothing is exacted from the owners of special franchises which is not exacted from owners of property, generally.¹⁵ State control over structures in the highway would seem to follow from the recognized right of the legislature to control the highway itself.¹⁶ No method for valuing special franchises was provided by the legislature. However, this omission does not constitute a failure of due process of law for the statute must be construed to be a part of the general tax law.¹⁷ Whether such a method can be supplied *aliunde* is more doubtful. In a recent case, *People ex rel. Jamaica Water Supply Co. v. State Board of Tax Commissioners* (N. Y. 1909) 89 N. E. 581, the Court of Appeals sanctioned, for that case, the "net earnings" rule. From the gross earnings, operating expenses, including an allowance for depreciation, taxes, and a fair return on the capital invested in real and tangible personal property are to be deducted. The residue capitalized at a fair rate gives the value of the special franchise.

Theoretically this residue of the net earnings is not solely attributable to the special franchise,¹⁸ although this objection is scarcely insuperable. But further, it is not clear that the value of the corporate franchise is not included since the value of a special franchise may depend upon the earning capacity of the corporation owning and exercising it, as a going concern.¹⁹ This rule, too, seems inapplicable to telephone and telegraph companies, a large part of whose earnings results from messages sent to, and received from points outside the state. The court, however, does not attempt by judicial legislation to supply the omission of the legislature by declaring the above to be the established rule for all cases; its inapplicability in cases in which it would work injustice is expressly recognized. The resulting undesirable uncertainty, however, can apparently be avoided only by legislation.

PLEADING THE STATUTE OF LIMITATIONS TO A FEDERAL INDICTMENT FOR CONSPIRACY.—In criminal practice the federal courts follow the principles of the common law as it existed in the states at the time of the adoption of the constitution.¹ For pleading the statute of limitations to an indictment several methods seem available. It has been held that this defense may be raised by general demurrer,² and this method has been used where the lapse of the statutory period was apparent on the face of the indictment. It has not, however, been much approved in the federal courts due, doubtless, to the fact that, though from the face of the indictment the limitation period may seem to have passed, exceptions to its running, not there set

¹⁴*Buffalo Gas Co. v. Volz* (N. Y. 1900) 31 Misc. 160.

¹⁵*People ex rel. v. Tax Com'rs.* (1903) 174 N. Y. 417.

¹⁶*People v. Flagg* (1871) 46 N. Y. 401.

¹⁷*People ex rel. v. N. Y.* (1904) 199 U. S. 48.

¹⁸*Union Pac. R. R. Co. v. U. S.* (1878) 99 U. S. 402, 420.

¹⁹*People ex rel. v. Barker* (1897) 152 N. Y. 417.

¹*U. S. v. Reid* (1851) 12 How. 361; *Erwin v. U. S.* (1889) 37 Fed. 470, 488; *U. S. v. Nye* (1880) 4 Fed. 888.

²*U. S. v. Watkins* (1829) 3 Cr. C. C. 441, 550.